IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2355 OF 1994

Smt. Nupur Khandelwal
a sole proprietor of M.L.K.
Agencies having its place of
business at 3rd floor, 108/116
Vithalvadi, Kalbadevi Road,
Bombay- 400 002. ..... Petitioner.

Versus

1. Municipal Corporation of Greater
Bombay having its office at
Mahapalika Marg, Mumbai 400 001

2. The Assessor and Collector
(octroi) having his office
at Mahapalika Marg,
Bombay 400 001.

3. State of Maharashtra ..... Respondents.

WITH

WRIT PETITION NO. 2271 OF 1994

Sunil Khandelwal of Bombay
Indian Inhabitant residing
at Vishwa Mahal Road, Churchgate
Bombay- 400 020 and carrying on
business as a sole proprietor
in the firm name and style of M.L.K.
Trading Company at 108/116 Vithalwadi,
Kalbadevi Road,Bombay - 400 002 ....Petitioner.

Versus

1.The Municipal Corporation of
Greater Bombay having its office
at Mahapalika Marg,Bombay 400 001.

2.The Assessor and Collector
(octroi) having his office

at Mahapalika Marg,Bombay 400 001

3. State of Maharashtra ...Respondents.

WITH

WRIT PETITION NO.2348 OF 1994

M.L.K.Enterprises a
partnership firm registered
under the Indian Partnership
Act and carrying on its
business at 3rd floor, 108/116
Vithalwadi, Kalbadevi Road,
Bombay 400 002. ..... Petitioner.

Versus

1. The Municipal Corporation of
Greater Bombay having its
office at Mahapalika Marg,
Bombay 400 001.

2.The Assessor and Collector
(octroi) having his office
at Mahapalika Marg,Bombay 400 001

3. State of Maharashtra ...Respondents.

WITH

WRIT PETITION NO.2351 OF 1994

Mr.Bipin Vora
Sole proprietor of Modern
Sanitary Stores, carrying on
business at 66 Kika street,
Bombay 400 004 .... Petitioner.

Versus

1. The Municipal Corporation of
Greater Bombay having its
office at Mahapalika Marg,
Bombay 400 001.

2.The Assessor and Collector

(octroi) having his office
at Mahapalika Marg,Bombay 400 001

3. State of Maharashtra ...Respondents.

WITH

WRIT PETITION NO.2359 OF 1994

Vora Ceramics Private Limited ..... Petitioner
carrying on its business at
36, Nagdevi street,Bombay 400 003.

Versus

1. The Municipal Corporation of
Greater Bombay having its
office at Mahapalika Marg,
Bombay 400 001.

2.The Assessor and Collector
(octroi) having his office
at Mahapalika Marg,Bombay 400 001

3. State of Maharashtra ...Respondents.

Shri P.C.Mody i/b Hariani & Company for the petitioner in all above matters.

Shri R.J.Mane, A.G.P.for respondent no.3 in all above matters.

None for respondent Nos.1 and 2 though served, in all above matters.

CORAM: R.M.S.KHANDEPARKAR &
V.M.KANADE,JJ.
DATE :3rd October 2005.

-ORAL JUDGEMENT (PER R.M.S.KHANDEPARKAR,J)-

1. Since common question of law and facts arise in these petitions, they were heard together and are being disposed of by this common Judgement.

2. We have heard the learned Advocate for the petitioners and the advocate for the Respondent No. 3 in all the petitions and have perused the records. None has appeared on behalf of the respondent Nos.1 and 2, though duly served.

3. In all these petitions the following questions arise :-

(i) Whether the iron pipes and fittings imported in the city by the petitioner are classifiable under Item No.47 or under item no. 28 of the Schedule H appended to the Municipal Corporation Act,1888?

(ii) Whether the decision of this Court in Hindustan Engineering Products Company & Anr.v/s Municipal Corporation of Greater Bombay & Ors., reported in 1993 Mah.L.J.415, is applicable to the petitioners' product for the purpose of classification and levy of octroi ?

4. The Petitioners are the traders and dealers in cast iron pipes and pipe fittings and in the course of the said business, they have been importing those items in the city of Bombay and within the jurisdiction of Corporation and being so, the same are subjected to the payment of octroi duty in terms of the provisions of the Mumbai Municipal Corporation Act 1888, hereinafter called as "the said Act." Prior to issuance of orders under challenge, the products in relation to the iron pipes and pipe fittings were being classified under Item No.47 of the Schedule H of the said Act. However, without any prior notice, the same were sought to be classified under Item No.28 of the said Schedule, consequent to the passing of impugned orders. Similar type of situation was faced by Hindustan Engineering Products Company in the year 1988 and their products of similar nature were classified under Item No.28 instead of Item No.47. The said Company had challenged the said decision before this Court in Writ Petition No. 520 of 1988 which came to be disposed of on 11.11.1992 by the learned Single Judge of this Court, reported in **1993 Maharashtra Law Journal 415**, holding therein that iron and pipe fittings would fall under Item No.47 of Schedule H and not under Item No.28 thereof. The said decision was brought to the notice of the respondents under letters issued in August 1994 to

the Corporation. However, the Municipal Corporation refused to classify the petitioners' product under Item 47 and insisted for its classification under item No. 28. Hence the present petitions.

5. Relying upon the decision in **Hindustan Engineering Products Company's case (supra)** learned counsel for petitioners submitted that the law having been well settled as regards the classification of iron pipes and pipe fittings by the said decision, it was necessary for the Corporation to classify the petitioners' product of iron pipes and pipe fittings under Item No. 47 and not to insist for classification under Item No. 28. All along during the earlier years the products of petitioners were classified under Item No. 47. Without any prior notice, suddenly the respondents started classifying the same under Item No.28. Such a procedure is not permissible. Reliance is placed in the matter of **K.P. Varghese v/s Income Tax Officer, Ernakulam and another reported in AIR 1981 S.C. 1922**. The attention was also drawn to the decision of **Bharat Forge & Press Industries (P) Ltd. v/s Collector of C. Ex. reported in 1990 (45) E.L.T. 525 (S.C.)**. He has further submitted that the petitioners have not passed on the burden of octroi duty on their customers and there has

been a categorical statement made by the petitioners in that regard in the petition. The decision in **Hindustan Engineering Products Company's case (supra)** clearly lays down the law on the point of classification of iron pipes and pipe fittings under Item no.47 of Schedule H and that was not specifically in relation to the products of Hindustan Engineering Products Company alone but it relates to the product of the like nature irrespective of the person or the firm dealing with such product.

6. Perusal of the decision in **Hindustan Engineering Products Company's case (supra)**, reveals that the learned single Judge after taking note of the decision of the Apex Court in **Bharat Forge and Press Industries (P) Ltd.'s case (supra)** as well as description of items which can be classified under Item 47, 48, 49 and 28 of Schedule H of the said Act, had observed that Item 28 deals with the glass, glassware, chinaware, enamelware, all kinds of crockery used for construction or decoration of buildings and sanitary fittings, metal valves, brass cocks and their fittings. Evidently, these are the items which are all required after the basic structure is complete. While observing that every pipe does not become a sanitary fitting, it was also recorded that the pipes have various uses. A pipe may be used for the

purpose of sanitation, but that by itself cannot change its description as "pipe" and convert it into "sanitary fitting" more so, when the Legislation has specifically incorporated "iron and steel pipes" as a separate and distinct commodity under Item 47 for the purpose of levy of octroi. While dealing with the question as to whether pipe fittings would also be included in Item No.47 or they will stand excluded therefrom merely because the expression used in item 47 is "iron and steel pipes", and referring to the decision of Apex Court in **Bharat Forge and Press Industries (P) Ltd.'s case (Supra),** it was held thus,"normally pipes and tubes are produced as long and straight pieces. But by themselves they cannot fulfil all the needs or the end use for which they are intended. To get the maximum use out of the pipes and tubes, it is necessary not only to produce long and straight pipes and tubes but also to turn out pipes and tubes of smaller dimensions and of different shapes and curves such as bends, elbows, 'T' pieces, 'Y' pieces, plugs, caps, flanges, joints, unions, collars and so on. This is done by a process of forging, welding, hammering and so on applied to the longer tubes but basically the items remain the same and the use also remains the same. The tariff entry calls for no distinction between pipes and tubes manufactured out of sheets, rods, bars, plates or

billets and those turned out from larger pipes and tubes." The above ruling clearly follows the decision of Apex Court in **Hindustan Engineering Products Company's case.** It obviously discloses that iron pipes and pipe fittings which are the products with which the petitioners deal with, are clearly classifiable under Item 47 and not under Item 28 of Schedule H.

7. Learned single Judge while referring to the decision of Apex Court in **K.P.Varghese's case (supra)** had clearly observed that "it may be appropriate to observe that while changing the interpretation of taxable commodities, the authorities concerned should keep in mind the well settled law by the Supreme Court that interpretation given by the authorities and acted upon by them for long years should not be changed or departed from." That was a decision delivered as long back as on 4.9.1981 and was reported in **AIR 1981 SC 1922.**

8. Though none has appeared on behalf of Corporation inspite of the fact that the matter relates to the revenue to Corporation, the affidavit in reply filed on record discloses two defences sought to be raised in the matter. Firstly that unjust enrichment on the part of the petitioners in case of order of refund and secondly

that the decision of **Hindustan Engineering Products Company's case (supra)** to be in personam and not in rem. The respondents have not pointed out any dissimilarity between the product of the petitioner herein and that which was the subject matter of the decision in Hindustan Engineering Products Company's case.

9. As already seen above the decision in **Hindustan Engineering Products Company's case(supra)** clearly interprets the provisions in relation to classification of product of iron pipes and fittings for the purpose of levy of octroi duty. Undoubtedly, decision was given consequent to the dispute having arisen in relation to the products manufactured by Hindustan Engineering Products Company. Nevertheless, the decision deals in detail, the obligation of the Corporation in relation to classification of products like iron pipes and pipe fittings in general and not necessarily which were manufactured by the petitioners in the said petition, and lays down the proposition of law that such product is classifiable under Item 47 and not under Item 28 of Schedule H of the said Act. It also reminds the Corporation a well established principle of law laid down by the Apex Court that the interpretation given by the authorities and acted upon by them for long period should

not be changed or departed from. Certainly, by no stretch of imagination, such a ruling can be said to be a ruling in personam. A judgement can be said to be in personam if it is in relation to a particular person as distinguished from the one about the identity or status or classification of some particular thing or subject matter. The later being called as the judgement in rem.

10. The affidavit in reply also contains a statement to the effect that there are several disputed questions of facts involved in the matter. However, as rightly submitted by the learned Advocate for the petitioners, the affidavit in reply nowhere discloses the facts which can substantiate the submission on behalf of the Corporation that the petitions involve disputed questions of fact. Indeed, it is necessary to remind to the Corporation like all other public bodies that the affidavit which is required to be filed in reply to the petitions should necessarily contain the facts which can justify the submission made on behalf of the respondents in defence of their case. Mere submission on the point of law in the affidavit would not be of any benefit to the respondents, unless a factual matrix to substantiate such submission is effectively described in the affidavit. In fact, an affidavit has necessarily to

relate to the facts and in that regard, it could be well advised to such bodies that before finalising the affidavits in reply to Writ Petitions, they should at least glance through the provisions of Order XIX of the Code of Civil Procedure Code,1908.

11. Once the law on the relevant point has been elaborately discussed and decided by this Court in Hindustan Engineering Products Company's case (supra) it was not only improper on the part of Corporation to insist for classification of the products of petitioners contrary to the sad decision, but it was totally an illegal act on the part of respondents. It is not the case of respondents in their affidavit-in-reply that the decision in **Hindustan Engineering Products Company's case (supra)** was ever challenged by way of appeal or that there is any other decision either of this Court or of the Apex Court contrary to the law laid down in **Hindustan Engineering Products Company's case (Supra).** In other words, with effect from 11/11/1992 the date on which the said decision was delivered, to which the Corporation was party, it was binding upon the Corporation in relation to the product of iron pipes and pipe fittings and in relation to the classification thereof for the purpose of levy of octroi duty. Without complying with the said

decision, Corporation insisted for classification of the petitioners' similar product under Item 28 of Schedule H merely to warrant payment of octroi duty to the extent of about 4% as against 1 1/2% in relation to the product classifiable under Item no. 47. The respondents are liable to be saddled with the costs. Needless to say that the respondents would be entitled to recover such costs from the Officers who are responsible for non compliance of the decision of this Court and for insisting for the classification of the Petitioners' product under Item 28 after holding necessary enquiry and fixing the liability in that regard.

12. For the reasons recorded above, the petitions succeed. The petitioners' product in question is required to be classified under Item 47 of Schedule H of the said Act. The octroi duty collected in excess to the one payable in relation to Item 47 shall be refunded by the respondent nos. 1 and 2 to the petitioners within a period of 8 weeks from today.

13. The petitioners shall also be entitled for cost of Rs.5000/- in each of the petition and shall be paid by the respondent Nos. 1 and 2 within 8 weeks from today.

14. The Respondent Nos. 1 and 2 are at liberty to recover the costs from the Officers responsible for non-compliance of the decision in **Hindustan Engineering Products Company's case (supra)** and insisting for payment of octroi duty from the petitioners in contravention to the law laid under the said decision. The rule in the above petitions is made absolute in above terms.

(R.M.S.KHANDEPARKAR,J)

(V.M.KANADE,J)